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Supreme Court of the United States

OCTOBER TERM, 1946

No. 255

SOL COHEN, et al.,

Petitioners,

against

CAULDWELL WINGATE CO., POIRIER & MCLANE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME~~ COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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I. BEN GREENMAN,
JONATHAN B. BINGHAM,
Counsel for Petitioners.

Harold Leventhal,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME~~ COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE SUPREME COURT OF THE UNITED STATES:

The undersigned petitioners respectfully allege:

Summary Statement of Matter Involved

This is an action to recover overtime pay under the Fair Labor Standards Act. Plaintiffs, petitioners here, were employed as timekeepers and cost clerks in the construction of a wartime "staging area" known as Camp Shanks at Orangeburg, New York (just north of the New Jersey border and just west of the Hudson River) (R. 48-54, 67-71, 86-7). It is admitted that during 1942 and 1943 plaintiffs worked substantial numbers of overtime hours, for which they were paid straight time rather than time and a half. The amount of such overtime work performed by each plaintiff was stipulated (Plffs.' Ex. 5, R. 97, 124).

The only issue is whether they were entitled to the protection of the Act.

The project on which plaintiffs and defendants were engaged was a vast one, costing well over $20,000,000, and involved many different types of activity, including: the construction of barracks and accessory accommodations for large numbers of troops being processed for shipment overseas; the rehabilitation of a dock on the Hudson River; the improvement and extension of the existing interstate rail and highway connections, and of the interstate electrical transmission network in the area; the maintenance and repair of existing interstate roads; the unloading of great quantities of materials from outside the State; the loading of other materials for shipment outside the State, and the various operations of a large office staff involving constant interstate communications (R. 55-61, 75-6, 80-8, 102-6, 114-15, 120-2). Some of these activities were clearly interstate in character, others were intrastate, but organizationally defendants drew no distinction between them, at least in so far as plaintiffs' work was concerned.

In general, plaintiffs' duties were to check defendants' other employees in and out of the area, to make "field checks", and to tabulate the results. This work was "to a very large degree" centralized, and was not broken down according to types of employees checked, or according to types of operations (R. 48-55, 62-71, 86-7). In short, plaintiffs' activities related to defendants' operations as a whole, and were indispensable to all of those operations.

On these facts plaintiffs contend that they are entitled to recover. The courts of New York have taken a contrary view, insisting that plaintiffs were not entitled to the protection of the Act because they did not attempt "to identify any particular individuals with such [interstate] work or to indicate any percentage or proportion of time which they individually or collectively devoted to such work."

The plaintiffs also contend that they were "engaged in the production of goods for commerce" within the meaning of the Act and hence are entitled to protection under that phase of the statute's coverage. This contention was likewise rejected by the New York courts.

Statement on Jurisdiction

This action is brought under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., §201, the pertinent provisions of which are set forth in Appendix A. The plaintiffs' right of action being based entirely upon this Federal statute, the jurisdiction of this Court is invoked under §237(b) of the Judicial Code of the United States (28 U. S. C., §344(b)).

The action was commenced in the Supreme Court of the State of New York and judgment was rendered for the defendants on August 3, 1945 (R. 37-41). The opinion of Mr. Justice Cohalan is reported in 185 Misc. 389 and appears at R. 129-30. That decision was affirmed in the Appellate Division of the Supreme Court of the State of New York in an opinion which is reported in 270 App. Div. 478 and appears at R. 145-6, and judgment was entered on July 17, 1946.

An appeal from that judgment was taken to the Court of Appeals, the highest court of the State of New York, by permission of that Court, and on January 9, 1947, the judgment was affirmed without opinion (296 N. Y. 776). A remittitur was issued the following day, and the order and judgment on remittitur were duly entered in the Supreme Court of the State of New York on January 20 and 27, 1947, respectively. A motion for reargument was made in the Court of Appeals, and said motion was denied on May 22, 1947. This petition for certiorari is filed within less than three months of that date.

Questions Presented

1. The principal question in this case is whether the plaintiff employees were "engaged in commerce" within the meaning of the Fair Labor Standards Act during the time of their employment by the defendants. The answer to that question depends upon the degree of particularity of proof to be required of each of plaintiff employees in cases of this general character.

2. A second question, which need be considered only if the first question is answered in the negative, is whether the plaintiff employees were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Reasons for the Issuance of the Writ

1. The case at bar involves an important Federal question which has not been, but should be, determined by the Supreme Court of the United States.

2. The decision of the Court of Appeals of the State of New York, as originally handed down and as reaffirmed upon the motion for reargument, is in direct conflict with decisions in the Second and Fourth Circuits, and is not in accord with the applicable decisions of this Court, such as: *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *J. F. Fitzgerald Construction Co.* v. *Pederson*, 318 U. S. 740, 324 U. S. 720; *Mabee* v. *White Plains Publishing Company*, 237 U. S. 178, and *Anderson* v. *Mt. Clemens Pottery Co.*, 90 L. Ed. 1114.

The importance of the basic issue presented here in the application of the Fair Labor Standards Act is explained in the brief submitted herewith. Broadly stated, the sit-

uation is as follows: the New York Courts have here set up a procedural obstacle which will effectively deny the protection of the Fair Labor Standards Act to large blocks of employees who are entitled to that protection. It is respectfully submitted that this Court should decide whether or not that obstacle is to stand.

Prayer for Writ

Wherefore, your petitioners respectfully pray that a writ of certiorari issue out of this Court to the ~~Supreme~~ Court of Appeals of the State of New York, directing that Court to certify and send to this Court a transcript of all the proceedings of such Court in this case, to the end that this cause may be reviewed and determined by this Court; that the order and judgment of the ~~Supreme Court of the State of New York on remittitur from the~~ Court of Appeals of the State of New York be reversed; and that your petitioners be granted such other and further relief as may be proper.

Sol Cohen, Abe Kravit, Harry Lampert, Charles Bowlby, Harry Ambrose, Joseph A. Anzano, Abraham Attas, Irving Bachtinger, Richard Bassi, Sidney Jerry Baumfeld, Thomas J. Blessing, Wallace Bliven, Anthony Borelli, Noah A. Bower, Richard A. Bradley, Rudolph Braun, Arthur P. Brown, John F. Brown, Robert M. Caggiano, Michael Carchietta, Emile J. Cella, Abraham Cohen, Sol Coleman, Jack Cronthal, Gidion Dakin, Arthur F. Daschner, Pasquale De Laurentis, James A. De Lisio, Nicholas De Rose, George Duke, Ernest Faisant, Alexander Ferris, Benjamin Feurstein, Alfred Fickera, Eli Fishbein, Max Fishkin, Norbert Fried, Robert Gallo, Israel Gargle, Ira M. George, James Gleason, Bernard Gold, David Goldfarb, Bernard Gottlieb, Henry H. Gray, Howard Griffith, Daniel Halpern, Benjamin Herman, Abe Hohauser, James M. Holli-

man, Irving Hutkins, Harry Irwin, George H. Jackson, Thomas H. Johnston, Morris Kaminkowitz, Irving Kaplan, Jack Kersner, Benjamin Klate, Ernest D. Korman, Benjamin Krumholz, Isadore Leibowitz, Leo Le Vine, Peter Lo Curto, Thomas Lown, Harry Ludwig, Sam Ludwig, Louis Massanet, Michele Mazzola, Harry L. Mintz, Mac Modell, Charles Montag, Sanford J. Moore, Wm. Morellis, Jr., Edward A. Morris, Max Newman, George T. O'Brien, Domenick A. Pagliocca, Louis A. Papantonia, Alfred Potito, Joseph Price, Henry Ripps, Alvin Rosenblum, Stanley M. Rothblatt, Edwin Russell, William S. Russell, Herman Ruthberg, Max Martin Schachtman, Julius Schneider, Abraham Schwartz, Ernest Schwartz, Michael A. Siano, Harry Siegel, Isidore Silverstein, Alexander Smith, Joseph M. Smith, Samuel Stelzer, Leonard Steinman, Harold B. Stewart, David Strauss, Morris Sugarman, Joseph H. Sumpf, Irving Swetlow, Charles Tenowitz, James Tucillo, Vincent Ulmer, Frank Vaccara, Louis Waldman, Gerson H. Wallman, James L. Walsh, Lucille Warner, as administratrix of the Estate of Charles Henry Warner, Edward Weiner, Joseph Weitzman, James L. Whalen, William G. Wicks, Samuel Winkler and Albert F. Zuzulo, all suing individually as Time Keepers and Time Checkers employed at the Orangeburg Project,

By Henry Cohen,
Their Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The required statements with respect to the opinions of the courts below, the jurisdiction of this Court, and the applicable statute are made in the accompanying petition (pp. 3-5, supra). A summary statement of the case is given in the petition at pages 1-3, supra. Additional pertinent facts are stated in the course of the argument which follows:

POINT I

Plaintiffs here were "engaged in commerce" within the meaning of the Fair Labor Standards Act.

The ruling of the courts of New York State with respect to the burden of proof imposes an impossible burden upon plaintiff employees in actions of this character and tends to defeat the purposes of the Act.

The crucial question in this case is one which is of utmost importance in the application of the Fair Labor Standards Act, but which has not yet been decided by this Court. Stripped to its essentials, the question is: where an employer whose operations are both interstate and intrastate in character does not in any way segregate the two or distinguish between them, and where some of his employees regularly perform work which is essential to both types of operations, must each employee prove what proportion of his time was allocable to the interstate phase? To answer that question in the affirmative, as the courts of New York State have done, is in effect to deprive many workers who are indisputably "engaged in commerce" of the protection of the Fair Labor Standards Act.

In order to make clear to this Court how impossible it would be for the plaintiffs here to meet the burden of proof sought to be imposed on them it is necessary to review some of the facts of the case in more detail.

An enormous quantity of materials was admittedly shipped to the project site from outside the State of New York, and was there unloaded by laborers employed by the defendants (R. 80, 115, 121). Other materials were loaded by defendants' employees for shipment out of the State (R. 122). An important part of the defendants' undertaking was the maintenance and repair of the local roads which were part of the interstate highway system, including a road connecting the camp with a dock on the Hudson River at Piermont (R. 56-61, 75-6, 84-5, 104-6). Another phase of the project, which was specifically provided for in defendants' contract, was the "rehabilitation" of that dock, an interstate facility (R. 112, 55-6, 84, 122). In addition, defendants' office staff was regularly engaged in interstate communication by mail, telegraph and telephone (R. 82-3, 120-1). By virtue of these activities—which were either admitted or established by uncontradicted testimony—the defendants were beyond any question "engaged in commerce". *Atlantic Coast Line* v. *Standard Oil,* 275 U. S. 257; *Overstreet* v. *North Shore Corp.,* 318 U. S. 125; *J. F. Fitzgerald Construction Co.* v. *Pederson,* 318 U. S. 740, 324 U. S. 720.

Finally, defendants were extensively engaged in the improvement and extension of existing interstate facilities. A railroad spur was built by the defendants connecting the project with the Erie Railroad (R. 85-6, 87-8); new roads were constructed to connect with the existing interstate highways (R. 55, 75, 106, 122); and an electrical transmission and distribution system was put in by the defendants connecting up with interstate power lines (R. 55, 84, 102-3, 114, 121). Although recognizing that this Court has not yet had occasion to decide that employees engaged in just such activities were "engaged in com-

merce", it is submitted that the rule laid down in *J. F. Fitzgerald Construction Co.* v. *Pederson*, supra, is applicable. The Circuit Court of Appeals for the Third Circuit so held in the case of *Walling* v. *McCrady Construction Co.*, 156 F. (2d) 932, cert. denied 91 L. Ed. 140. This decision received favorable comment in 60 Harv. L. Rev. 154.

In any event, whether or not extending interstate facilities is "engaging in commerce", it is indisputable that defendants' employees—laborers, office help, etc.—were in at least four respects extensively "engaged in commerce". Now the record shows that plaintiffs checked the time of all of defendants' employees indiscriminately, including laborers, mechanics, office help, and many other categories of workers. There was no breakdown for timekeeping purposes into categories of employees, much less into categories of activity. The plaintiffs' work was "to a very large degree" centralized, and in their work they made no distinction between employees who were engaged in interstate operations and those who were engaged in purely intrastate activities. The inference is thus inescapable that the work of all the plaintiffs contributed directly to defendants' interstate and intrastate activities alike * (R. 54-5, 66, 62-3, 68, 70).

The Appellate Division of New York State nevertheless found that the plaintiffs had failed to meet "the burden which was theirs of proving that their work was interstate commerce," because:

> "They did not attempt * * * to identify any particular individuals with such [interstate] work or to indicate any percentage or proportion of time which they individually or collectively devoted to such [interstate] work" (R. 145-6).

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* It would seem to require no argument that the administrative work of timekeeping and cost-checking was so closely related to the interstate activities checked as to be "in legal contemplation a part thereof". *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Walling* v. *McCrady Construction Co.*, 156 F. (2d) 932, cert. den. 91 L. Ed. 140; cf. *McLeod* v. *Threlkeld*, 319 U. S. 491. Defendants have never seriously contested this point.

The New York Court of Appeals affirmed without opinion.

It requires only a moment's reflection to see that the New York courts have here laid down a rule which frustrates the purposes of the Act, and which will disentitle large groups of employees in interstate commerce from the benefits of the Act. By its terms, for example, the rule would prevent redcaps in a railroad terminal from recovering under the Act, because they could not say whether or how much of their time they spent in carrying interstate bags.

In the present case, likewise, there was no way for the timekeepers to tell which of the employees they checked in and out at the time shacks were working on the interstate phases of the operation. It is true that the timekeepers also made daily "field-checks" out on the project, but even there it would have been impossible to determine the interstate or intrastate character of the work going on. For example, a laborer engaged in unloading trucks might be unloading materials from inside the State or from outside—there would be no way to tell.

Conceivably the defendant contractors might have kept records which would show just what the employees whose time was checked by a given timekeeper were working on during a given week. They produced no such records, and in practical fact it is improbable that they kept any. Nevertheless, it would seem that it was up to the defendants to introduce proof which might show that, as to certain individual plaintiffs, the inference raised by the plaintiffs' general showing was incorrect. In other words, although the plaintiffs may have had the burden of proof initially, when they proved that they were engaged indiscriminately in interstate and intrastate activities, they put the burden of going forward upon the defendants. The defendants chose to put in no proof and rested at the close of the plaintiffs' case.

The reasoning of this Court in the case of *Anderson* v. *Mt. Clemens Pottery Company*, 90 L. Ed. 1114, with respect to the manner of meeting a somewhat similar burden of

proof is wholly applicable. As in that case, it can here be said that employees should not be penalized for their employer's failure to keep records. However, the issue here is more than a matter of whether plaintiffs or defendants should have kept records sufficient to show whether a given timekeeper was employed at any given time in checking interstate or intrastate activities. It may be conceded that, given the organizational set-up of the defendants, it would have been almost as impossible for them to keep such records as for the plaintiffs to do so. The point—which is one of general application far beyond the limits of this case—is that, *if employers engaged in interstate as well as intrastate activities, do not choose to organize their operations so as to draw a distinction between the two types of activity, they cannot expect to avoid the effect of the Act as to those employees whose work extends into both fields.*

This point has been fully recognized by two Circuit Courts of Appeal. *Guess* v. *Montague,* 140 F. (2d) 500 (4th Circ., 1943); *Skidmore* v. *Casale,* 160 F. (2d) 527 (2nd Circ., March 6, 1947). Judge Parker's excellent opinion in the *Guess* case includes the following significant passage:

> "It is a fair inference from the evidence that plaintiffs here worked on interstate as well as intrastate business; that the two classes of business were commingled in defendant's operations; and that defendant did not attempt to distinguish between the two in the payment of wages. Under such circumstances, we think that plaintiffs have made a prima facie showing entitling them to the protection of the act" (p. 504).

In the *Skidmore* case, which was decided after the original decision of the Court of Appeals in the present case, plaintiff employees assigned to the repair and maintenance of trucks rented out by the defendant were held to be "engaged in commerce". Some of the trucks were used by defendant's customers to carry goods in interstate commerce, but there was no finding as to the percentage of such use. Further, the Court noted:

"No evidence was introduced to show any division of labor as between trucks used in interstate commerce and on those not so used. *Nor was there any analysis made of the amount of time that each man spent on trucks used in interstate shipments.*" (Italics supplied.)

The conflict between the *Skidmore* case and the decision of the Court of Appeals in the instant case is direct. If not resolved by this Court, it will result in intolerable confusion in the application of the Act in New York State and will lead to an unseemly anxiety on the part of defendant employers to avoid the Federal forum.

POINT II

Plaintiffs here were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Under either of two distinct theories the entire project at Camp Shanks constituted the "production of goods for commerce" within the meaning of the Act. If this is so, plaintiffs as timekeepers and cost clerks on the project were obviously covered by the Act and no burden of proof problem arises. *Borden Co.* v. *Borella,* 325 U. S. 679; *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Roland Electrical Co.* v. *Walling,* 90 L. Ed. 326.

Under the first theory the project may be said to have involved the "production of goods for commerce" because (1) the processing of troops for overseas shipment was such production and (2) the construction of the camp was "necessary" to that production. This follows logically from the very broad definitions of terms contained in the Act. Combining those definitions, the "production of goods for commerce" includes "any process or occupation necessary to" the "handling" of "subjects of commerce". It is clear that persons may be "subjects of commerce". *Cami-*

netti v. *United States,* 242 U. S. 470, 479. It is also clear that the construction of the camp was prerequisite to the processing of the troops. The fact that the work of construction may have stopped before the processing began is immaterial. *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. 88. It is true that the lower Federal courts have in a number of cases decided that the construction of productive facilities is not covered by the Act,* but we contend that these cases are inconsistent with the holding of this Court in the *Warren-Bradshaw* case, and should be overruled.

The second ground for holding that the construction of the camp was itself "production of goods for commerce" is that the camp was to be an instrumentality of commerce. By definition, a staging area, since it is a place for the collection, organization and preparation of troops for shipment, is an instrumentality of commerce—just as much, say, as a railroad yard where trains are assembled. A staging area remains stationary, but so does a section of railroad track, and both are instrumentalities of commerce. The entire project constituted the forging of another link in a chain of commerce, transportation and activity which was not merely interstate but world-wide.

Three Circuit Courts of Appeals have held that "production of goods for commerce" means production of goods *to facilitate commerce* even though these goods may not themselves move across State lines. *Hamlet Ice Co.* v. *Fleming,* 127 F. (2d) 165 (4th Circ., 1942), cert. den. 317 U. S. 634; *Chapman* v. *Home Ice Co.,* 136 F. (2d) 353 (6th Circ.), cert. den. 320 U. S. 761; *Atlantic Co.* v. *Walling,*

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* *Anderson* v. *Federal Cartridge Corporation,* 62 F. Supp. 775 (D. Minn.); *Brue* v. *Steers,* 60 F. Supp. 668 (S. D. N. Y.); *Damon* v. *Ford, Bacon, Davis, Inc.,* 62 F. Supp. 446 (E. D. Pa.); *Dollar* v. *Caddo River Lumber Co.,* 43 F. Supp. 822 (D. Ark.); *Noonan* v. *Fruco Construction Co.,* 140 F. (2d) 633 (C. C. A. 8th); *Scott* v. *Ford, Bacon & Davis,* 55 F. Supp. 982 (E. D. Pa.); *Wells* v. *Ford, Bacon & Davis,* 7 Labor Cases, par. 61,929 (W. D. Ky.), aff'd 145 F. (2d) 240 (C. C. A. 6th).

131 F. (2d) 518 (5th Circ., 1942). The Wage and Hour Administrator has adopted this view (Release A-14, March 13, 1945, appearing in CCH Labor Service, par. 33,076). The Administrator has accordingly ruled that the production of such items as railroad ties and telephone poles for use within the same State should be regarded as covered. It would seem to follow *a fortiori* that construction of a new siding or station, or of a staging area, would be covered.

This Court has not yet passed on this point, which is of wide significance, and should do so.

CONCLUSION

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

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APPENDIX A

Pertinent provisions of the Fair Labor Standards Act of 1938

29 U. S. C. Section 201 et seq.

§ 202. *Congressional Finding and Declaration of Policy.*

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

§ 203. *Definitions.*

As used in sections 201-219 of this title—

* * * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

§ 207. *Maximum Hours.*

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * * *

(3) For a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.